Supreme Court, U.S.
FILED
DEC 16 2009
OFFICE OF THE CLERK

No. 09-359

In The
Supreme Court of the United States

NANO MALDONADO, AN INDIVIDUAL,

Petitioner,

v.

RANDELL IWASAKI, IN HIS CAPACITY AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED
(As Presented by the Petitioner)

1. Is the legal distinction between commercial and noncommercial speech so vague, overbroad, and arbitrary that it violates Due Process and abridges the Freedoms of Speech and Press?

2. Is the commercial-noncommercial distinction overbroad as to billboards under the fourth prong of the *Central Hudson* test? What legal standards should be used to evaluate injunctions and equal protection claims involving a commercial-noncommercial distinction [on billboard copy]?

3. In the context of billboards, does an offsite commercial speech restriction materially advance æsthetic and traffic safety interests as a matter of law, or must the government submit substantial evidence to prove the law is effective, both in the aggregate and as-applied to the particular billboard?

PARTIES

Respondent Director Randell Iwasaki is the Director of the California Department of Transportation, informally referred to as "Caltrans." The Department is an agency of the sovereign state of California created pursuant to California Government Code sections 14000 *et seq.* and statutorily entrusted with enforcing the California Outdoor Advertising Act. Cal. Bus & Prof. C. § 5250. Section 5419 of the Act obligates the Director to provide for effective control of outdoor advertising as defined in 23 U.S.C. 131 (the "Highway Beautification Act", or HBA). The only potential pecuniary interest the Department has with respect to the control of outdoor advertising is the collection of an annual permit fee when an outdoor advertising permit is issued, but that fee is statutorily limited to the recovery of costs, not to exceed $100. (Cal. Bus. & Prof. C. § 5485 (a)(2)).

Petitioner Nano Maldonado is an individual.

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Kempton v. Maldonado, 544 U.S. 968 (2005) (denying certiorari);

Maldonado v. Harris, 370 F. 3d 945 (9th Cir. 2004).

The Petition lists virtually every order and opinion since this matter moved to the federal courts.

JURISDICTION

The Decision of the Ninth Circuit was entered on February 25, 2009. Petitioner's petitions for rehearing were denied on June 24, 2009. The Petition for Writ of Certiorari was filed on September 22, 2009. Respondent had originally waived the right to file a response; however, on November 16, 2009, the Clerk of the Court requested that Respondent file this response.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1), which provides that cases and decisions in the courts of appeals may be reviewed by the Supreme Court by a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the First and Fourteenth Amendments to the U.S. Constitution are involved.

The California Outdoor Advertising Act (Cal. Bus. & Prof. C. §§ 5200 *et seq.*) is also involved.

STATEMENT OF THE CASE

Beginning in 1956, and for decades thereafter, the billboard at issue was used as an onsite advertising structure for Granny Goose Potato Chips, which were produced in the building upon which the billboard is located. No outdoor advertising permit was required for onsite displays at the time of its construction, nor is one presently required under the California Outdoor Advertising Act so long as the copy is for onsite goods or services. The warehouse and display are in Redwood City, California, adjacent to U.S. Highway 101, a properly designated "landscaped freeway." (Cal. Bus. & Prof. C. § 5216).

In 1965, Congress enacted the Highway Beautification Act, codified at 23 U.S.C. 131. Shortly thereafter, in 1967, California revised the California Outdoor Advertising Act, originally enacted in 1939, to provide that "no advertising display may be placed or maintained on property adjacent to" a landscaped freeway "if the advertising display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway." (Cal. Bus.

& Prof. C. § 5440). The Act enumerated exceptions to the landscaped freeway ban in section 5442 and expressly allowed for onsite advertising. (Cal. Bus. & Prof. C. § 5442(c)). The Act also "grandfathered" lawfully erected offsite advertising displays. (Cal. Bus. & Prof. C. § 5216.1). Contrary to Petitioner's unsupported assertion[1], California enforces the ban on offsite commercial advertising according to law, including within the "same zone" as the subject display. While the Petition does not expressly implicate the HBA, it should be noted that the California state standards (e.g., the onsite/offsite distinctions) challenged here are virtually identical to the relevant sections of the HBA – and for that matter, the relevant sections of every state of the Union save one.

Approximately a quarter of a century after the pertinent revisions to the Act, and the concomitant issuance of regulations, Petitioner Nano Maldonado purchased the warehouse and its rooftop display which had never had an outdoor advertising permit for offsite copy. In 1993, Maldonado applied to the California Department of Transportation for an outdoor advertising permit in accordance with the procedures set forth in the Act. (Cal. Bus. & Prof. C. §§ 5350 *et seq.*) Notwithstanding the fact that the application was properly denied, Maldonado nevertheless "continued using the billboard for offsite

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[1] "Worse yet, the government admittedly does not enforce the ban against others in the same zone." Petition at p. 8. Please see Petitioner's App. 49 and following (from an order from the district court below) for an explanation of the "grandfathering" of signs, all of which had lawful offsite permits, within the same segment of landscaped freeway.

advertising despite numerous citations." (*Maldonado v. Morales*, 566 F.3d 1037 (9th Cir. 2009) Petitioner's App. 4).

Maldonado's attempt to fabricate qualifying "onsite" businesses -- by requiring that would-be advertisers on the billboard lease office space in the building (the office space was never actually used) along with the billboard -- was soundly rejected by a California state appellate court. *People ex rel. Dep't of Transport. v. Maldonado*, 86 Cal.App.4th 1225 (2001) ("*Maldonado I*"). Undeterred by the decisions of the state trial and appellate courts, Maldonado continued his offsite advertising and was twice found by California state courts to have violated the injunction.

Maldonado then moved to the federal forum and challenged the constitutionality of the entire California Outdoor Advertising Act, both facially and as-applied. The district court found that the COAA failed to satisfy First Amendment standards solely because it did not explicitly allow noncommercial speech wherever any commercial speech was permitted (*Maldonado v. Kempton*, 422 F.Supp.2d 1169, 1176 (N.D. Cal. 2006) ("*Maldonado III*")). Although facially unconstitutional, the district court found that the Act was constitutional as applied because there was no showing that any noncommercial speech had ever been impermissibly denied.[2] The district court therefore ordered a

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[2] In the state court proceedings involving Appellant, there was an issue whether particular copy qualified as "noncommercial," but there was never an issue whether noncommercial copy

measured series of corrective steps to insure that California's long-standing policy of allowing noncommercial messages was continued, codified, and publicly known (*Maldonado III* at 1178-79). On July 17, 2006, California promulgated an emergency regulation (which took effect immediately) to expressly exempt noncommercial messages from the Act's prohibitions. (California Code of Regulations, Title 4, section 2240(e)). In April 2007, Senate Bill 715 added Business and Professions Code § 5275. The section, signed by the Governor in July 2007, effective January 1, 2008, provides that:

> "Notwithstanding any other provision of this chapter, the director may not regulate noncommercial, protected speech contained within any advertising display authorized by, or exempted from, this chapter."

California's immediate regulatory and legislative correction cured the only constitutional defect identified by the Honorable Judge Breyer. Petitioner now challenges the COAA and the regulatory and statutory amendments under the First and Fourteenth Amendments, seeking what amounts to a *de novo* review of many questions that are now or always were moot. Beyond challenging the Ninth Circuit decision, Petitioner primarily expresses his desire to abolish the Commercial Speech Doctrine (Petition at p. 44) and obliterate of

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could be placed on the display. See *Department of Transportation v. Maldonado* ("*Maldonado I*") (2001) 86 Cal.App.4th 1225, 104 Cal.Rptr. 2d 66).

all federal and state laws regarding outdoor advertising. Such a course of action would be ill-advised and unnecessary, and the Petition is an inappropriate vehicle by which to seek it.

ARGUMENT/REASONS FOR DENYING THE PETITION

In his effort to portray this case as one worthy of review by this Court, Maldonado takes liberties with the factual record, misrepresents or ignores the statutory scheme he purports to challenge (Rule 10), elevates distinctions without differences into inter-circuit splits, confuses the First Amendment's coverage with the scope of its protection, and grafts disparate constitutional doctrines together. The constitutional chimera he creates is not a viable one, however, because each of the constituent doctrines he interprets is well-settled, particularly as to outdoor advertising displays.

Maldonado's first principle is that the distinction between commercial and noncommercial speech should be unlawful, notwithstanding the fact that this Court has always accorded noncommercial speech greater protection under the ægis of the First Amendment. If one accepts his contention "that the commercial-noncommercial distinction is arbitrary," it necessarily follows that this Court must overrule every prior decision on that point, including *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Petitioner compounds the problem by not restricting himself to advocating the wholesale reversal of governing First Amendment jurisprudence. Perhaps

in tacit recognition that his case presents no novel issue or split in circuit authority for this Court's consideration, Maldonado unnecessarily adds Due Process and Equal Protection claims into the mix.

At the same time, he conflates the long-standing commercial-noncommercial distinction with the general ban on commercial speech within a narrowly designated space (adjacent to, and visible from, specified segments of highway) and its very limited exception for onsite commercial copy, essentially arguing that the exception must invalidate the rule codified in the Highway Beautification Act at 23 U.S.C. 131(c)(3) and by 49 states and the Commonwealth of Puerto Rico. By so doing, he seeks to overrule the core holding of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

The plurality in *Metromedia* recognized the challenge "of applying the broad principles of the *First Amendment* to unique forums of expression." *Id.* at 500. The general four-part test[3] announced in *Central Hudson* was therefore applied to the specific medium of *billboards* with express attention devoted to the offsite exception which Maldonado now presents to the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding

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[3] (1) The *First Amendment* protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977), citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). In *Metromedia*, those narrowest grounds include the holding that the onsite exception does not render the general ban on commercial billboards impermissible. The prescriptive reach of *Metromedia* with respect to political signs, mass market mailings, street furniture,[4] news racks, and other media may be in doubt, but there is no question that it upheld the onsite exception for billboards as passing constitutional muster. As such, the instant Petition raises no question worthy of the Court's attention.

In the years since *Central Hudson* and *Metromedia* were decided, this Court has revisited and expounded on certain facets of the four-part test, but it has never expressly or implicitly overruled either. All of the cases cited by Petitioner may be read as in harmony with – not in opposition to – *Metromedia*.

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[4] As noted in correspondence from the Petitioner on November 5, 2009, the Court recently considered whether or not to grant *certiorari* in the case of *Metro Lights, L.L.C. v. City of Los Angeles*, No. 09-259. *Cert.* denied, Dec. 14, 2009. Although Petitioner claims that *Metro Lights* raised "a legal issue that is identical to one of the issues raised [here]," namely the continued vitality of *Metromedia*, the legal question posed is distinct. At issue in *Metro Lights* was whether or not the law of the Ninth Circuit had properly applied *Metromedia* to offsite advertising copy on street furniture. The instant case presents no teleological extension; it falls squarely within *Metromedia*.

The first question presented[5] by Maldonado is whether or not "the legal distinction between commercial and noncommercial speech [is] so vague, overbroad, and arbitrary that it violates Due Process and [unconstitutionally] abridges the Freedom of Speech and Press." Since both the Due Process Clause and the First Amendment involve distinct lines of jurisprudence (as do vagueness, overbreadth, and arbitrariness), they will be considered separately, though the former will receive lesser exploration, following Petitioner's lead. None of the issues raised by Petitioner's pregnant first question implicate an area of the law that requires clarification of any kind.

Petitioner's second question [sic] presented is 1) whether or not an unidentified decision regarding overbreadth and newsracks is binding as to billboards and 2) what legal standards should be used to evaluate injunctions and equal protection claims involving a commercial-noncommercial distinction. Assuming that the former question refers to *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1992), the question is answered in *Cincinnati* itself at fn. 20: "*Metromedia* ... is not to the contrary.... Unlike this case, which involves discrimination between commercial and noncommercial speech, the 'offsite-onsite' distinction

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[5] Petitioner erroneously asserts that "the California Outdoor Advertising Act prohibits offsite commercial advertising." (Petition, p. i). "The COAA does not ban all signs, or even nearly all signs, but only off premises, commercial billboards. Maldonado remains free to post any non-commercial messages or to post onsite advertising on his billboard." *Maldonado IV* at 1046.

involved disparate treatment of two types of commercial speech." The progeny of *Central Hudson* should be read in harmony, not in conflict. The latter question does not seem conceptually related to the first, nor does Petitioner elaborate the decisional law regarding injunctions or Equal Protection. It is worth noting in passing, however, that the injunction simply enjoined Maldonado from displaying off-premise copy on his billboard and that none of the lower courts found that Maldonado had established a basis for invoking Equal Protection.

Petitioner's last question presented asks if "an offsite commercial speech restriction materially advance[s] aesthetic and safety interests as a matter of law, or must the government submit substantial evidence to prove the law is effective, both in the aggregate and as-applied to the particular billboard?" *Metromedia* answered affirmatively at 510-12; Justice Stevens, dissenting in part at 541, Chief Justice Burger, dissenting at 560, Justice Rehnquist, dissenting at 570.

I. THE LEGAL DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH DOES NOT VIOLATE DUE PROCESS.

Maldonado has styled his Petition, *inter alia*, as a Due Process challenge. Given the extraordinary number of administrative, state, and federal fora that have reviewed the advertising copy on Mr. Maldonado's unpermitted outdoor advertising display, and because he articulates no procedural shortcomings, he must refer to substantive due process even though the authority he cites is almost

all First Amendment jurisprudence. The thrust of Maldonado's argument seems to be that the commercial-noncommercial distinction itself is so inherently vague and arbitrary that it violates substantive Due Process.

A. There is no conflict among the circuits regarding the well-settled commercial-noncommercial distinction that justifies granting the Petition.

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.... the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.
>
> *Ohralik v. Ohio State Bar Assn.* 436 U.S. 447, 456 (1978)

In section I[6]. C. of his petition, Maldonado contends that the Ninth Circuit has decided an important question of federal law -- that the distinction between commercial and noncommercial speech does not deny Due Process -- in a way that conflicts with other circuit courts and the California Supreme Court. None of the cases cited in support of his Petition, however, reach a contrary conclusion. In fact, this Court in *Central Hudson* confirmed a lower standard of constitutional protection for commercial speech.

1. No Circuit or other court has found that the commercial-noncommercial distinction is unconstitutionally vague such that it violates Due Process.

> *Condemned to the use of words, we can never expect mathematical certainty in our language.*
>
> *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)

According to Maldonado, the Ninth, Fourth, Seventh and Tenth Circuits have all rejected vagueness challenges to the commercial-noncommercial distinction, albeit on different grounds.

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[6] The Petition states (p. 8): "THIS COURT SHOULD REVIEW WHETHER THE COMMERCIAL-NONCOMMERCIAL DISTINCTION VIOLATES DUE PROCESS"

Far from creating a "lack of predictability," however, every analytical approach -- from the "Dual Analysis" of *Outdoor Systems Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993) through the "Economic Interests" of *Major Media of the Southeast v. City of Raleigh* 792 F.2d 1269, 1273 (4th Cir. 1986), the "Fundamental Purpose" of *Lavey v. City of Two Rivers*, 171 F.3d 110, 116 (7th Cir. 1999), and the "Multi-Factor" of *National Advertising Co. v. City and County of Denver*, 912 F.2d 405, 410 (10th Cir. 1990) -- yields a uniform result: The commercial-noncommercial distinction survives the scrutiny of a constitutional vagueness challenge. Maldonado fails to show a circuit split because he cannot identify a single opinion from any jurisdiction that finds the commercial-noncommercial distinction unconstitutionally vague.

When all judicial roads lead to Rome, the conflict is illusory. It is also worth noting that Maldonado -- although asking this Court to elect a uniform, procrustean approach from among several adopted by the various circuits -- advocates overruling them all.

Contrary to the Petitioner's assertion, the Ninth Circuit did not rule that "the standards articulated by this Court violate Due Process" (Petition at p. 28) for a lack of audacity, but rather because of *stare decisis*, the unequivocal guidance of this Court, and because it has no authority whatsoever to find that binding Supreme Court precedent violates constitutional principles.

While in many instances there may be a clear distinction between procedural and substantive due process claims, an overlap can exist. See *Santosky v. Kramer*, 455 U.S. 745, 747-748 (1982), (requiring the government to meet heightened procedural requirements before terminating parental rights because such rights are fundamental). Where a person is seeking to have a government action declared unconstitutional as violating a constitutional right, then substantive due process is involved. If a person seeks to have a government action declared unconstitutional because of the lack of adequate safeguards, then procedural due process is in issue. In this case, the Petitioner raises both procedural and substantive due process claims; the argument that there is not a clear standard being the procedural claim, and the alleged violation of his rights as the substantive claim. See Writ of Petition, 32. Therefore both are separately addressed below.

Under Procedural Due Process, laws and regulations have been struck down as unconstitutional when they have been too vague or indefinite to provide adequate guidance to would be law-abiding citizens, enforcement officials, or courts. *Pope v. Illinois*, 481 U.S. 497, 515 (1987); *Winters v. New York*, 333 U.S. 507, 509-510 (1948). The doctrine of vagueness incorporates notions of fair notice or warning by requiring that the law provide a man of average intelligence with a reasonable understanding of what contemplated conduct is proscribed. *United States v. Mazurie*, 419 U.S. 544, 553 (1975).

The regulatory scheme of the California Outdoor Advertising Act is not vague, and the Petitioner does not challenge it as such. The COAA bans the use of Petitioner's billboard for offsite commercial advertisements. Cal. Bus. & Prof. C. §§ 5440 & 5216.1. The Act expressly allows onsite commercial advertising and non-commercial speech. Cal. Bus. & Prof. C. §§ 5442(c) & 5275. Unable to mount any credible due process attack on the COAA, the Petitioner has morphed his displeasure with this Court's jurisprudence regarding the commercial-noncommercial distinction in First Amendment cases into a Due Process argument. Respondents urge the Court to steer clear of this misguided and confusing line of argument in an area of law that is already cumbersome.

Substantive Due Process, as applied to the states, is derived from the Fourteenth Amendment's prohibition against a state depriving "any person of life, liberty, or property without the due process of law." U.S. Const. amend. XIV, § 1. The doctrine allows for the incorporation of provisions from the Bill of Rights that are deemed fundamental and to protect these rights from infringement by the states. *Gitlow v. New York*, 268 U.S. 652 (1952). In relevant part, these rights include the First Amendment's freedom of speech. *Id.* Incorporation of a right under Due Process however, does not alter the level of scrutiny normally associated with the right.

While the Petitioner may be justified in invoking Due Process, in the limited sense that it is the Due Process clause of the Fourteenth Amendment that applies the protections of the First

Amendment to the states, this is in substance a freedom of speech case. Thus, this Court's jurisprudence in the area of freedom of speech along with its applicable level of scrutiny controls this case.

2. No Circuit has found that the commercial-noncommercial distinction is unconstitutionally overbroad as applied to outdoor advertising displays.

One of the salient features of the four-part *Central Hudson* analysis is that the medium matters. As this Court noted in *Metromedia* at 501: "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method. We deal here with the law of billboards", (paraphrasing Justice Jackson in *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Far from being an empty "talismanic phrase", as Petitioner attempts to dismiss such distinctions (Petition at pp. 43-44), the notion that the medium matters is the bedrock of the constitutional analysis. This Court has always treated different media with unique characteristics differently and has clearly articulated the reasons for those differences.

The decisions in *Cincinnati* and *Metromedia* are complementary, not contradictory because they both follow the tenets of the *Central Hudson* framework. This conclusion is supported by the procedural history of *Cincinnati*. The Sixth Circuit found no controlling opinion in *Metromedia*. *Discovery Network, Inc. v. City of Cincinnati*, 946

F.2d 464, 470 n. 9. Rather than affirm that interpretation, this Court explained that:

> *Metromedia, Inc. v. San Diego, 453 U.S. 490, 69 L. Ed. 2d 800, 101 S. Ct. 2882 (1981)*, upon which the city heavily relies, is not to the contrary. In that case, a plurality of the Court found as a permissible restriction on commercial speech a city ordinance that, for the most part, banned outdoor 'offsite' advertising billboards, but permitted 'onsite' advertising signs identifying the owner of the premises and the goods sold or manufactured on the site. *Id., at 494, 503.* Unlike this case, which involves discrimination between commercial and noncommercial speech, the 'offsite-onsite' distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations; moreover, the plurality concluded that a 'city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising,' *id., at 511-512.* Neither of these bases has any application to the disparate treatment of newsracks in this case.
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> *Cincinnati* 507 U.S. 410 at 425, fn. 20 (1993).

Maldonado urges that *Cincinnati* implicitly overrules *Metromedia* when the cases should be read in harmony.

Petitioner relies on *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999), *Rappa v. New Castle County*, 18 F.3d 1043 (3rd Cir. 1994), and *Solantic LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005) for an alleged split in authority on the commercial-noncommercial distinction as overbroad.

The *obiter dicta* in *Lavey* is not persuasive. Not only did that court decline to rule on the subject, it simply expressed a concern that underinclusivity may be an issue absent "sufficient evidence of a fit between the [commercial-noncommercial] distinction and the city's safety and aesthetics goals exists." *Lavey* 171 F.3d at 1115, fn 16. In *Cincinnati*, the "fit" was egregious because the ordinance was tailored in such a fashion that it would require "the removal of 62 newsracks while about 1,500 to 2000 [would] remain in place." *Cincinnati*, 507 U.S. 410 at 418. It is also worth noting that the *Lavey* court found that "the ordinance is 'carefully-crafted' to meet the safety and aesthetic goals in articulates." *Lavey*, 171 F.3d at 1115.

In *Rappa*, the court analyzed *Metromedia* in the context of political signs and was "unable to derive a governing standard" for that purpose. With respect to commercial billboards, it concluded that "the plurality opinion indicated that content-based distinctions within the category of commercial speech were permissible" and interpreted "the *Metromedia* plurality to have been concerned with the fact that the San Diego ordinance allowed a broad type of commercial speech (onsite speech) while not allowing non-commercial speech. . . . That concern is not

implicated here given our interpretation of the statute to allow commercial and non-commercial onsite speech." *Rappa*, 18 F.3d at 1055, 1056.

The difficulty arose from a different part "of the plurality's ruling – that distinctions within the category of non-commercial speech must be supported by a compelling state interest." *Id* at 1056. The decision does not convey the analytical agony over the commercial-noncommercial distinction which Maldonado imparts to it. Then-Circuit Judge Alito's concurrence is noteworthy not only for its call for clarification regarding the on-site exception, but also because it opines that one chapter of the challenged ordinance "has a very limited geographical reach, applying only to areas adjacent to the interstate and primary highway system" and should therefore survive "the test for a content-neutral time, place, and manner restriction." *Id* at 1080.

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005), as noted by Petitioner, adopts the *Metromedia* plurality's reasoning. Even if the Eleventh Circuit's *Marks* analysis concludes that *Metromedia* is not binding, the practical effect is that it is still the law of the circuit which hardly yields a circuit split.

B. No state-federal conflict on the commercial-noncommercial distinction exists.

Petitioner's contention regarding the existence of a federal-state conflict is also unfounded.

Contrary to Petitioner's characterization, *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 960 (2002), *cert. dism.*, 539 U.S. 654 (2003), did not introduce a new "Who is Speaking?" test "for making the commercial-noncommercial distinction." (Petition at p. 30). Apart from Petitioner's dubious nomenclature, which emphasizes the first element of a tripartite process, the case stands only for the proposition "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." *Nike*, 27 Cal.4th at 946. "[The California Supreme Court] has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech." (Emphasis in original.). *Id.* at 959.

Nike merely concludes that California's Unfair Competition Law (Cal. Bus. & Prof. C. §§ 17200 *et seq.*) passes muster under both the U.S. and the California Constitutions. The California Supreme Court expressly stated that its limited-purpose test is not for general application:

> The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment, nor has this court adopted such a test under the state Constitution, nor do we propose to do so here.... We conclude, therefore, that *when a court must decide whether particular speech may be subjected to laws aimed at*

> *preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or non-commercial speech requires consideration of three elements, the speaker, the intended audience, and the content of the message. (Italics in original).

Nike, 27 Cal.4th at 960.

Petitioner is correct that *Nike* is binding in California state court, but incorrectly represents its "limited purpose" test as having broad application. The holding in *Nike* is easily reconciled with the apposite line of cases which hold that the states are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. *Friedman v. Rogers*, 440 U.S. 1 (1970); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985).

Stripped of the commentary and questionable conclusions[7] drawn from disparate lines of free

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[7] See e.g. the second "Rule" derived under the "Common Sense" cases, which misstates the ratio decidendi of the cases which were decided on the grounds that the government could not completely suppress the advertising of lawful products and did not address the level of scrutiny. Virginia Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 (1976): "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information...." and "Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this [] statute, which singles out speech of a particular content and seeks to prevent its dissemination

speech cases, the gravamen of the Petition is that First Amendment jurisprudence is in disarray with respect to outdoor advertising displays because of the complex decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the doctrinal confusion of which is exacerbated by *Cincinnati* and other subsequent cases. A cursory examination of *Metromedia* demonstrates that no such jurisprudential disarray exists.

C. *Metromedia* provides a dispositive rule regarding onsite-offsite advertising copy which does not require clarification.

Maldonado's Petition reveals that the true thrust of his challenge deals not with the commercial-noncommercial distinction, but rather to the limited onsite exemption. As he frames the alleged constitutional issue, he cannot place *offsite* "truthful, non-misleading advertisements about lawful products and services on his own legally built [onsite] billboard structure." (Petition at p. 8, first full paragraph.).

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completely." Id. at 770. See also Linmark Associates, Inc. v. Township of Willingboro, 431 U.S 85, 96 (1977) "The constitutional defect ... is far more basic. The Township Council here, like the Virginia Assembly in Virginia Pharmacy Board, acted to prevent its residents from obtaining certain information" and Carey v. Population Services International, 431 U.S. 678, 700 (1977) "the statute challenged here seeks to suppress completely any information about the availability and price of contraceptives."

Petitioner Maldonado conflates and confuses the commercial-noncommercial and onsite-offsite distinctions in his treatment of the *Metromedia* decision. Contrary to Petitioner's hyperbolic claim, the different treatment accorded the two categories of commercial speech is not "doctrinally convoluted, distressingly bewildering to practitioners and judges, and hopelessly confusing to lay people." (Petition at p. 9). It is well-settled. The instant case treads no ground that has not been covered by *Central Hudson*, *Metromedia*, *Cincinnati*, and their progeny.

Although the *Metromedia* decision has generated some scholarly debate regarding its reach, the instant controversy as framed by Petitioner is easily resolved by the unambiguous portion regarding the distinction between onsite and offsite copy under the *Central Hudson* test. As noted in *Rappa v. New Castle County*, 18 F.3d 1043, 1055 (3rd Cir. 1994) "the plurality concluded that the statute's content-based distinctions within the category of commercial speech -- between onsite and offsite commercial advertising, and between "for sale" signs and other signs did not undercut the city's argument that the ordinance directly advanced its aesthetic and safety interests." *Rappa* at 1055, citing *Metromedia*, 453 U.S. at 511-12. "The plurality's decision as to the regulation of commercial speech was expressly joined by Justice Stevens." *Id.* at 1055, fn 18.

Application of the *Marks* rule makes clear that the instant case falls squarely within the "position taken by those Members who concurred in the

judgment on the narrowest grounds." *Marks*, 430 U.S. 188, 193 (1977).

The billboard specific treatment of the four-part *Central Hudson* test in *Metromedia* is well-settled with respect to the onsite-offsite distinction.

D. Deference should be accorded to the legislative distinction between onsite and offsite commercial advertising, which was introduced in the Highway Beautification Act and mirrored in the codes of 49 states and the Commonwealth of Puerto Rico.

Petitioner's request to eliminate the long-standing legislative distinction between onsite and offsite commercial speech on billboards would effectively repeal critical portions of the Highway Beautification Act codified at 23 U.S.C. 131 and all of its state analogs. Subsection (c)(3) expressly exempts onsite advertising from its general ban,[8] and the basic approach of banning all commercial

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[8] (c) Effective control means that such signs, displays ... visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to ... (3) signs, displays, and devices including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located.

signs then exempting on-premise ones is followed by 49 states and the Commonwealth of Puerto Rico.[9]

First and foremost, the fact that so many jurisdictions have embraced the onsite exemption

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[9] Please see e.g. Code of Ala. § 23-1-273; Alaska Stat. § 19.25.105(a)(2); A.R.S. § 28-7902 A.2.; A.C.A. §§ 27-74-204(b)(2), 27-74-302(3); Cal. Bus. & Prof. C. 5442.5(c); C.R.S. §§ 43-1-401 et seq., esp. 43-1-403(14), 43-1-404(1)(b); Conn. Gen. Stat. § 13a-123 (e)(3); 17 Del. C. §§ 1108(c), 1121(3); Fla. Stat. § 479.16; O.C.G.A. §§ 32-6-72(3), 32-6-73(3); HRS §§ 264-72(3), 445-112(3)(4); Idaho Code §§ 40-1904(3), 40-1911; 225 ILCS 440/4.03, Burns Ind. Code Ann. § 8-23-20-7 (3); Iowa Code § 306C.11 2.; Kansas' Highway Beautification Act of 1972, K.S.A. §§ 68-2231 et seq., esp. 68-2233(c); KRS §§ 177.841(2)(c), 177.863(2)(d); La. R.S. §§ 48:461.2 A(2); Md. Code Ann. § 8-727 (c); 23 M.R.S. § 1914; ALM GL ch. 93D, § 2 (b); MCLS § 252.302(q); Minn. Stat. § 173.08(3); Miss. Code Ann. § 49-23-5(1)(c); § 226.520 (2) R.S.Mo.; Mont. Code Anno., §75-15-111(1)(c); R.R.S. Neb. §§ 39-218, 39-202(2)(c); Nev. Rev. Stat. Ann. § 410.320 3; N.J. Roadside Control and Outdoor Advertising Act, esp. N.J. Stat § 27:5-11 c.; New Hampshire RSA 236:73 III.(c); N.M. Stat. Ann. § 67-12-4 A.(3); NY CLS High § 88 2(c); North Carolina Outdoor Advertising Control Act codified at N.C. Gen Stat. §§ 136-126 et seq.esp. 136.129.1(3); N.D. Cent. Code §§ 24-17-03 3, 24-17-03.1 3; ORC Ann. 5516.06(C); 69 Okl. St. §§ 1273(h)(i), 1274(b); ORS 377.715; 36 P.S. § 2718.104(iii); 9 L.P.R.A. § 51 (q); R.I. Gen. Laws § 24-10.1-3; South Carolina's Highway Advertising Control Act at S.C. Code Ann. §§ 57-25-110 et seq., esp. 57-25-430(a)(6), 57-25-640(a)(6); S.D. Codified Laws § 31-29-63(3), Tenn. Code. Ann. §§ 54-21-103(3), 54-21-107(a)(1); Tex. Transp. Code § 391.031(b)(3); Utah Outdoor Advertising Act, esp. Utah Code Ann. § 72-7-504(1)(c); 10 V.S.A. § 493; Va. Code Ann. § 33.1-355(1); Rev. Code. Wash. (ARCW) §§ 47.42.040(3), 47.42.062(3)(e); W. Va. Code § 17-22-7; Wis. Stat. § 84.30 (3)(c); Wyo. Stat. § 24-10-104(a)(iii). The Oregon Supreme Court is the only high court to invalidate a statutory onsite exception, but it did so under the state constitution. Outdoor Media Dimensions, Inc. v. DOT, 340 Ore. 275 (2006).

argues forcefully against Maldonado's contention that the distinction is arbitrary. The legislative unanimity is also evidence that the values of traffic safety and esthetics are compelling state interests, that a general ban on commercial advertising advances that interest, and that the exceptions are narrowly tailored. Additionally, the fact that the Highway Beautification Act and its state analogs all have survived judicial scrutiny for many decades with a solitary exception show that the law is not at all in disarray as Maldonado claims.

The framework of the legislation, a general ban subject to enumerated exceptions, evinces careful deliberation when balancing First Amendment freedoms with other countervailing rights. The "for sale" and on-premises exceptions reflect that the Congress and legislatures struck a reasonable balance between First Amendment and property rights. An attempt to reconcile competing interests should be upheld unless it produces a manifestly unreasonable "fit." *Metromedia* expressed a preference for deference to legislative solutions (*Metromedia*, 453 U.S. at 511-512), and no subsequent decisions have disturbed that preference.

II. THE LONGSTANDING STANDARDS USED TO EVALUATE INJUNCTIONS AND EQUAL PROTECTION CLAIMS REGARDING THE LEGAL COMMERCIAL-NONCOMMERCIAL DISTINCTION ON BILLBOARD COPY NEED NOT BE REVIEWED.

This Court has consistently ruled that a facial challenge to a legislative act must demonstrate that

no set of circumstances exist under which the act would be valid and that the act must have no plainly legitimate sweep.

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.

United States v. Salerno, 481 U.S. 739, 745 (1987). (Noting a "heavy burden" to demonstrate that an Act is facially unconstitutional.)

The Petition here does not even attempt to demonstrate how any act in question – and in particular the California Outdoor Advertising Act (Cal. Bus. & Prof. C. §§ 5200 *et seq.*) -- is invalid on its face. Despite identifying injunctions as one of the questions presented, Maldonado does not raise the issue elsewhere in the body of the Petition. The only injunction issued simply enjoined him from placing off-premise copy.

Maldonado is not a member of a suspect class and is not similarly situated to sign owners who had legal-nonconforming signs which were grandfathered

at the time the California Outdoor Advertising Act was enacted. Maldonado maintains that the Ninth Circuit incorrectly failed to adhere to the standard of intermediate-intermediate scrutiny set forth in *Madsden v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). In support, Maldonado cites one case for that proposition, *Ackerly Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d. 33 (1st Cir. 1996), but that court chose "to sidestep" the difficult question of "whether the onsite/offsite grandfathering restriction is a content-based restriction that triggers strict scrutiny." *Id.* at 37. The challenged Act is content neutral because it bans all offsite commercial advertising, regardless of content. The limited exception for onsite also does not pertain to content per se, but rather to identifying the property and the goods and services available at that location. Maldonado's prior restraint argument rests on his assumption that all billboard regulation constitutes a violation of the First Amendment.

III. THE PETITION RAISES NO REVIEWABLE ISSUE AS TO HOW OFFSITE COMMERCIAL SPEECH RESTRICTIONS LAWFULLY AND LEGITIMATELY ADVANCE ÆSTHETIC AND TRAFFIC SAFETY INTERESTS.

As stated above, the instant controversy as framed by Petitioner is easily resolved by the unambiguous *Central Hudson* test. As noted in *Rappa v. New Castle County*, 18 F.3d 1043, 1055 (3rd Cir. 1994) "the plurality concluded that the statute's content-based distinctions within the category of commercial speech -- between onsite and offsite

commercial advertising, and between "for sale" signs and other signs did not undercut the city's argument that the ordinance directly advanced its aesthetic and safety interests." *Rappa* at 1055, citing *Metromedia*, 453 U.S. at 511-12. "The plurality's decision as to the regulation of commercial speech was expressly joined by Justice Stevens." *Id.* at 1055, fn 18.

> The plurality first holds that a total prohibition of the use of 'outdoor advertising display signs' for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between onsite and offsite commercial signs, [citation omitted], and I therefore join Parts I through IV of JUSTICE WHITE's opinion.

Metromedia, 453 U.S. at 541, Justice Stevens, dissenting in part.

The billboard specific treatment of the four-part *Central Hudson* test in *Metromedia* is well-settled with respect to the onsite-offsite distinction which was narrowly tailored by Congress in the Highway Beautification Act of 1965. No review of the instant case is required or desirable.

Petitioner's treatment of this issue is nothing more than a cursory survey of a small handful of cases that this Court and the Sixth and Ninth Circuits have considered. However, there is no substantive analysis of the Ninth Circuit decision that the Petition seeks to bring before this Court or why that decision needs to be reviewed.

The closest the Petition comes to any such analysis is to refer back to its discussion in the previous section of the Petition (pp. 32-39) as to why the commercial-noncommercial distinction is overbroad and content-based. This reference back reveals that this entire section of the Petition (pp. 40-44) is nothing more than a cold rehash of the same issues presented earlier and adds nothing to the analysis of the alleged issues there.

Therefore, ultimately, as with the Petition's other arguments, there is no issue from the decision here that warrants this Court's review.

CONCLUSION

No matter how many different ways the Petition seeks to frame a reviewable constitutional issue from the Ninth Circuit's unanimous decision, there is no basis for review. The well-considered decision of the three-judge panel is, in and of itself, a wholly correct decision. The emphatic denial of both panel rehearing and *en banc* rehearing underscores that fact.

The Ninth Circuit's decision is also the culmination of years of administrative and judicial review - in both state and federal fora - of the issues raised by Petitioner's use of the display for unsanctioned offsite advertising. In each of those fora, Petitioner has lost at nearly every turn, and where he had limited success, subsequent legislative action corrected the flaw. That corrective legislation cured the constitutional defect and has obviated the need for further judicial review.

The Petition asks this Court for an advisory opinion on issues not properly before it simply because Petitioner disagrees with the state of the well-settled First Amendment law. Ultimately, however, there is no basis for review here.

For any and all the reasons state above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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